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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	In Equity No. C-125-ECR Subfile No. C-125-B **WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN OPPOSITION TO JOINT MOTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE FOR CERTIFICATION OF DEFENDANT CLASSES**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

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I. INTRODUCTION.

The Walker River Paiute Tribe (the "Tribe") and the United States filed their original counterclaims in this matter in 1992. By Order dated October 22, 1992, the Court directed the Tribe and the United States to serve their original counterclaims on all claimants to the waters of the Walker River and its tributaries pursuant to Rule 4 of the Federal Rules of Civil Procedure. By Order dated July 8, 1994, the Court clarified that its October 27, 1992 Order did not require the joinder of groundwater claimants. From February 23, 1993, through September 9, 1998, the Court granted the Tribe and the United States 13 extensions of time to join additional parties and complete service of process.

In 1997, the Tribe and the United States expanded their counterclaims to include claims related to groundwater. As a result of that expansion, the Court entered its Case Management Order on April 19, 2000. The Court identified nine categories of water rights holders and directed that "each of the members of each said category shall be named as a Counterdefendant in this case" and served with the respective First Amended Counterclaims brought by the United States and the Tribe. Case Management Order, pp. 5-6.

Now, more than 8 years after the Court first ordered joinder and service and almost 4 years after filing the First Amended Counterclaims, the Tribe and the United States have filed the *Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* (the "Class Certification Motion"). Rather than serve "each of the members of each said category," the United States and the Tribe now seek to have one entire category and a portion of a second category of water rights holders certified as classes. The United States and the Tribe assert that "[c]ertification of these two classes will, as a result, help the Court manage the 'enormity and complexity' of these proceedings." *Memorandum in Support of the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* (*Supporting Memorandum*), p. 3, lns. 11-12. They fail to support that assertion with either explanation or example. In truth, there is no advantage to a partial defendant class action in this case other than the obvious benefit to the United States and the Tribe in avoiding proper service of process upon individual water rights holders as

necessary party counterdefendants.[1] The Class Certification Motion cannot satisfy the legal requirement of FRCP 23. Nor does it serve any of the purposes for which the class action device was instituted.

II. STATEMENT OF FACTS.

A. The Claims Of The Walker River Paiute Tribe And Of The United States.

In its 1992 Counterclaim, the Tribe sought recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for 167,460 acres of land included in the Reservation in 1936. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. The 1992 counterclaim of the United States asserted similar claims to water for the benefit of the Walker River Indian Reservation.

On or about July 30, 1997, the Tribe amended its earlier claim ("Tribe's First Amended Counterclaim"). In addition to its original surface water claims, the Tribe's First Amended Counterclaim includes groundwater claims for the entire Reservation. At the same time, the United States also amended its claim ("United States' First Amended Counterclaim"). In addition to its original surface water claims, the United States' First Amended Counterclaim includes several specific claims to surface water and groundwater in the Walker River Basin for other federal enclaves, including the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps and the Bureau of Land Management. The United States' First Amended Counterclaim also advances claims for surface and groundwater for the Walker River Indian Reservation, the

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[1] The United States and the Tribe reveal that their true purpose in seeking class certification is to solve or, at least, avoid problems of serving defendants when they advise the Court that, in the future, "it may be necessary . . . to establish a class for the residual unserved members of one or more categories." *Supporting Memorandum*, p. 6, lns. 14-15. The class action was developed as a device to combine multiple lawsuits for purposes of judicial efficiency and consistency of decision making. It was not designed to aid plaintiffs in avoiding the requirement of service upon defendants.

Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual Indian allotments.

B. The Case Management Order.

The April 19, 2000 Case Management Order (the "CMO") bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). It stays all proceedings related to the Federal Claims and sets forth initial procedures for the prosecution of the Tribal Claims.

The CMO requires the Tribe and United States to serve their amended pleadings and related service documents on and thereby join numerous individuals and entities who hold surface and groundwater rights within the Walker River Basin. It groups these individuals and entities into nine different categories as follows:

(a) The successors in interest to all water rights holders under the Decree (April 14, 1936), modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc. (April 24, 1940) ("1936" Decree).

(b) All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basin who are not presently parties to this adjudication.

(c) All holders of permits or certificates to pump groundwater issued by the State of Nevada and domestic users of groundwater within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

(d) All holders of permits or certificates to pump groundwater issued by the State of Nevada within Sub Basins 106 (Antelope Valley), 109 (East Walker), and 110C (Whiskey Flat-Hawthorne Subarea of Walker Lake Groundwater Basin).

(e) All users of groundwater for irrigation in California.

(f) All holders of "vested rights" to the use of groundwater under the laws of the State of Nevada within the Walker River Basin.

(g) All municipal providers in Nevada within the Walker River Basin who currently use groundwater.

(h) All municipal providers in California within the Walker River Basin who currently use groundwater.

(i) All industrial users in Nevada within the Walker River who currently use groundwater.

The Tribe and the U.S. now seek to certify two classes, one for individuals and entities within category (a) and one for some, but not all, of the individual entities within paragraph (c).

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I consists of "threshold issues as identified and determined by the Magistrate Judge." Phase II will "involve completion and determination on the merits of all matters relating to [the] Tribal Claims" and may also include in that phase or subsequent phases:

(a) All other claims, crossclaims, counterclaims, defenses and issues raised by the pleadings of the parties that included in the threshold issues.

(b) All other issues related to the Tribal Claims.

(c) All issues related to the other Federal Claims.

See, CMO, pp. 11-12.

The identification of threshold issues is left to the Magistrate Judge and those issues shall "not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." CMO, pg. 9. The following possible threshold issues are to be considered for inclusion by the Magistrate Judge:

(a) Whether this court has jurisdiction to adjudicate the said Tribal Claims. If so, to what extent should the court exercise its jurisdiction in these matters. In this connection, what is the scope of this court's subject matter jurisdiction to adjudicate the Tribal Claims to groundwater, as well as to additional surface waters?

(b) Does federal law govern the pumping of groundwater on the Walker Lake Paiute Indian Reservation by the Tribe or the U.S. on its behalf?

(c) If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law, subject to different protections than those provided by State law?

(d) Whether the court has jurisdiction over groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the Tribe's rights under federal law to use water from the Walker River system. If so, should the court exercise that jurisdiction?

(e) Whether equitable defenses bar some or all of the said Tribal Claims.

(f) Whether, regardless of the extent of hydrologic connection between surface and groundwater, this court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law.

(g) Are the holders of surface water rights established under federal law entitled to protection from the use of groundwater beyond the protection provided to holders of surface water rights established under state law?

(h) If the only jurisdiction of this court with respect to groundwater issues is to protect surface water rights established under federal law from interference by junior groundwater users, must the issues of interference be decided as a part of the adjudication of federal surface water claims.

See CMO, pp. 9-11.

C. The Class Certification Motion.

The Class Certification Motion seeks certification of:

1) a defendant class of successors in interest to water right holders under the *Decree* (Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940), ("Decree"), with the Walker River Irrigation District ("District") acting as class representative; and

2) a defendant class of all those individuals and entities with a right to use groundwater for domestic purposes in sub-basins 107, 108, 110A and 110B in the Walker River Basin in Nevada, with the State of Nevada acting as class representative.

Supporting Memorandum at 1.

The certification is sought for purposes of litigating the threshold issues in Phase I and "addressing the declaratory relief that the United States and the Tribe seek in Phase II of the proceedings." *Id.*

D. The Water Rights Of The Proposed Classes And Class Representatives.

1. Introduction.

In order to decide the propriety of granting the relief requested by the Class Certification Motion, it is important for the Court to understand the scope of water rights held by the members of the proposed classes and the relationship of the members of the proposed classes to the proposed class representatives. The Court must also be familiar with the nature and extent of the water rights held by the proposed class representatives.

2. Water Rights Held By Members Of The Proposed Classes.

The Class Certification Motion seeks to certify a "defendant class of successors in interest to water right holders under the Decree" with the Walker River Irrigation

District acting as class representative. Members of that proposed class hold different assortments or packages of water rights and have different relationships with the District. The Class Certification Motion seeks to certify a defendant class of domestic groundwater users in Nevada with the State of Nevada acting as class representative. Members of that proposed class also hold different packages of water rights.

(a) Walker River Decree Water Rights Appurtenant To Lands Located In California.

There are approximately 26,000 water right acres in Bridgeport Valley in California. With respect to those lands, the Walker River Decree provides for direct diversion rights from the natural flow of the various tributaries to the East Walker River. In addition it allows for the storage of water in Upper Twin Lake, Lower Twin Lake, East Lake, West Lake and Green Lake all in California to be used to irrigate some, but not all, of those lands which also have a direct diversion natural flow rights under the Walker River Decree. These direct diversion, storage rights and storage reservoirs are owned by individual farmers and the water rights are established under California law. *See* Walker River Decree at pgs 49 - 60. None of the lands to which these water rights are appurtenant are within the boundaries of the District. However, some, but not all, of these lands may be owned by persons or entities who also own land with appurtenant water rights within the District.

There are approximately 14,600 water right acres in Antelope Valley, substantially all of which are located in California. The Walker River Decree provides for direct diversion rights from the natural flow of the West Walker River for irrigation of those lands. In addition it allows for the storage of water in Poor Lake in California to be used to irrigate some, but not all, of those lands in Antelope Valley which also have a direct diversion natural flow right. Those direct diversion, storage rights and storage reservoir are owned by individual farmers and in some cases by the Antelope Valley Mutual Water Company and the water rights are established under California law. *See* Walker River Decree at pgs 10-18. None of the lands to which these water rights are appurtenant are within the boundaries of the

District. However, some, but not all, of these lands may be owned by persons who also own land with appurtenant water rights within the District.

Some of the persons within these two California Valleys in addition to being members of the proposed successors in interest class, may also be users of groundwater for irrigation in California. Thus, they may have to be joined and served under Category 3(e) of the CMO.

(b) Lands Within The Walker River Irrigation District.

The surface water rights for lands within the boundaries of the Walker River Irrigation District, which is entirely within Nevada, are comprised of four categories. The Walker River Irrigation District was formed for the primary purpose of constructing, operating and maintaining Bridgeport and Topaz Reservoirs to conserve some of the surplus waters of the Walker River. The Walker River Decree recognizes water rights of the District in Bridgeport and Topaz Reservoirs. *See* Walker River Decree at pgs. 63A-65. Those reservoirs are not large enough to store all of the surplus waters of the Walker River. As a result, lands within the boundaries of the District do not have a single priority, common water right as do lands in many other irrigation districts.

Lands within the boundaries of the District retained their water right for the direct diversion of water from the natural flow of the Walker River as recognized in the Walker River Decree. These water rights are owned directly by individual farmers and are referred to herein as "Decree Rights". *See* Walker River Decree at pgs. 18-70. The Walker River Decree provides for direct diversion rights from the natural flow of the West, East and Main Walker Rivers for approximately 45,420 acres within the District. *Id.*

Nevada's Irrigation District Act required the directors of the District to examine each tract or legal subdivision of land within the District and to determine the benefits which would accrue to each tract or subdivision from the construction or purchase of irrigation works. The cost of those works was to be apportioned or distributed over the tracts or subdivisions of land in proportion to the benefits. The amounts so apportioned became and remain the basis for fixing annual assessments levied against the tracts of land.

As a part of that apportionment of benefits process the flows of the Walker River system were analyzed, as were the expected yields of the two Reservoirs. As a result of that process it was determined that lands with a Decree Right having a priority of 1873 and earlier would not require any supplemental stored water. Those lands were not and are not assessed for the Reservoirs. Lands with a Decree Right having a priority of 1874 and later were determined to require stored water to supplement those rights. Those lands were allocated a portion of the stored water from the Reservoirs. Such lands have both Decree Rights and Supplemental Storage Rights. Approximately 28,930 of the 45,420 water right acres within the District having direct diversion rights with priorities of 1874 and later, receive supplemental storage water from Bridgeport and Topaz Reservoirs.

Finally, because analysis showed that there would be additional stored water available after all Supplemental Storage Rights were satisfied, the remaining stored water was allocated to land which had no water right at all. This water right is referred to as a "New Land Water Right." A New Land Water Right provides only 2.0592 acre feet per acre per season, or approximately ½ of the amount of water required to irrigate an acre of land. Approximately 34,370 acres of land within the District with no direct diversion rights receive stored water from Bridgeport and Topaz Reservoirs.

In addition, because the available surface water is sometimes inadequate to provide a water right holder with a full duty of water, some, but not all, of the water right holders within the District also hold underground water rights for purposes of supplementing their surface irrigation water supplies. In addition, a small percentage of the underground rights for irrigation within the District are primary rights, rather than supplemental rights.

Finally, because most of the District is not within an area supplied by a municipal water purveyor, persons and entities in Smith and Mason Valleys who would be members of the proposed successor in interest class, would also be members of the proposed "domestic groundwater users class." Persons in the rural areas of the District have domestic wells.

Moreover, some of the persons and entities who would be members of the successors in interest class are also persons who must be served under category (3)(c) of the **CMO** as holders of permits or certificates to pump underground water for irrigation. Some may also be persons who must be served under Category 3(f) of the **CMO** as holders of "vested rights" to the use of underground water in Nevada.

3. Water Rights Held By The Proposed Class Representatives.

The District holds permits to surplus Walker River surface water in Nevada. It holds Permit No. 5528, and Certificate No. 8859 on the West Walker River for 491.2 cubic feet per second not to exceed 89,612 acre feet annually to irrigate described land within the District. That permit was issued by the Nevada State Engineer in 1971 and has a priority of June 6, 1919. The District holds Permit No. 25017 and Certificate No. 8860 on the East Walker River for 349.1 cubic feet per second not to exceed 63,688 acre feet annually to irrigate described land within the District. That permit was issued by the Nevada State Engineer on October 15, 1976 and has a priority date of April 11, 1969. Use of water under all of these permits is limited to not more than 4.0 acre feet per acre of water from all sources. These water rights are referred to as "State Certificated Rights." The District holds Nevada Permit No. 25813 for 9.01 cfs of groundwater not to exceed 3269.63 acre feet per season for use on specific lands within the District. This right is also limited to no more than 4.0 acre feet per acre from all sources. Finally, the District also holds Permit No. 9405, applied for in 1931 and issued in 1954, to appropriate up to 200,000 acre feet annually to be stored in a new reservoir on the West Walker River, downstream of Topaz Reservoir, commonly referred to as the Hoye Canyon Reservoir. This reservoir has not been built.

Nevada, through the Nevada Division of Wildlife (NDOW), is the single largest water right holder within the District. It holds Decree Rights, supplemental storage rights, secondary rights to effluent and underground rights. It also holds Nevada Permit No. 25992 for all "unappropriated flood waters" in the "East Walker, West Walker Rivers, Walker River and tributaries" for fish, game and recreation to support a more stable lake level at Walker Lake. A certificate of appropriation was issued to NDOW under this permit for 795.2

cfs not to exceed 575,870 acre feet per year with a priority of September 17, 1970. Finally, it holds a single domestic well.

III. BECAUSE IN ORDER TO GRANT EFFECTIVE RELIEF ON THE MERITS OF THE TRIBAL CLAIMS THE COURT WILL BE REQUIRED TO ADJUDICATE THE RELATIVE RIGHTS TO GROUNDWATER AND TO THE ALLEGED SINGLE SOURCE OF SUPPLY, THIS ACTION IS NOT APPROPRIATE FOR CLASS ADJUDICATION.

In contending that class adjudication is appropriate here, the Tribe and the United States place principal reliance on *United States v. Truckee-Carson Irrigation District*, 71 F.R.D. 10 (D. Nev. 1974). In *Truckee-Carson,* before the Court even considered whether the requirements of Rule 23 were met, it first examined whether the case could be distinguished from a general stream adjudication, recognizing that it is the rule that in such adjudications each individual appropriator must be brought before the court. *Truckee-Carson*, 71 F.R.D. at 14. After the *Truckee-Carson* court decided that the action was not a general adjudication, it addressed (1) whether all class members would be affected equally by the claims made by the Pyramid Tribe and the United States, and (2) whether members of the proposed class held water rights which could be applied against each other based upon priority. *Id.* at 14-15. Only after determining that all class members would be affected equally and that no class members had conflicting claims was the class certified.

Depending on the outcome of the threshold issues, the merits of the Tribal Claims have the potential to make this action a general adjudication with respect to groundwater and with respect to relative rights to the "single source" of supply. The United States and the Tribe seek declaratory and injunctive relief with respect to the Tribal Claims and the Federal Claims. With respect to the Tribal Claims, the Tribe asks the Court:

1. To recognize and declare and quiet title to:

   A. The right of the Tribe to store water in Weber Reservoir for use on the Reservation including the lands restored to the Reservation in 1936;

   B. The right of the Tribe to use water on the lands restored to the Reservation in 1936;

   C. The right of the Tribe to use groundwater underlying and adjacent to the Reservation on the lands of the Reservation including the lands restored to the Reservation in 1936;

D. The right of the Tribe to use groundwater underlying and adjacent to the lands restored to the Reservation in 1936 on the lands of the reservation including the lands restored to the Reservation in 1936.

2. Declare that the defendants and counterdefendants have no right, title or other interest in or to the use of such water rights.

3. Preliminary and permanently enjoin the defendants and counterdefendants from asserting any adverse rights, title or other interest in or to such water rights.

Tribe's First Amended Counterclaim, pp. 17-18. The United States seeks similar relief with respect to the Tribal Claims and the Federal Claims. *See* United States' First Amended Counterclaim, pp. 31-33.

As the Court recognized in the CMO, an essential element of the Tribal Claims and Federal Claims is the contention that "underground and surface waters [within the Walker River basin] constitute a single source." CMO p. 3. Thus, if the Court ultimately reaches the merits of those claims in order to arrive at a judgment which can administer all of the rights to that "single source," the Court will have to determine the relative priority and relationship of all such rights, surface and groundwater, to each other. That determination can only be made if persons whose rights to that "single source" which have not been previously adjudicated are joined and allowed and required to assert and prove those rights through appropriate counterclaims and crossclaims.

Although the Walker River Decree represents a comprehensive adjudication of the relative rights to use the surface waters of the Walker River and its tributaries in Nevada and California, there has never been a similar comprehensive adjudication of the relative rights to use underground water within the Walker River Basin in Nevada and California. There certainly has never been an adjudication which determines the relative rights to use water from the alleged "single source" within the Basin. Thus it cannot be said that this action will never be a general [underground water or single source] adjudication or a "fight among all appropriators on the [underground or single source] to establish their rights." *Truckee-Carson*, 71 F.R.D. at 14.

Even absent that potential, it is not true here that each class member will be affected equally by a "proportionate quantitative reduction of their water rights" as was the case in *Truckee-Carson*. Assuming arguendo that rights to undergroundwater are not regulated based upon priority, that does not mean that one who hold such rights in subbasins near or within the same basins as the Tribal Claims, basins 110A (Schurz) or 110B (Walker Lake) will be affected exactly like one who holds such rights in subbasins 107 (Smith Valley) and 108 (Mason Valley). Geographically and hydrologically the former are much closer to the Reservation than the latter and thus the potential for users in those basins being affected by the Tribal Claims may be far greater. Moreover, the fact that a permit is not required for a domestic well does not mean that, in appropriate circumstances, the prior appropriation doctrine would not be used to regulate conflicts among such wells.

Plaintiffs themselves acknowledge that the members of the proposed successors in interest class will not be affected equally by the Tribal Claims. Since each of those persons or entities has a water right with a priority date, those with senior water rights could defeat junior rights and mitigate or eliminate the effect of the Tribal Claims. Depending on the outcome of the "single source" issues, the members of the successors in interest class who have supplemental underground water supplies may also be affected differently by the Tribal Claims than those who have no such supplemental supply.

Contrary to the situation which existed in *Truckee-Carson*, the rights of members of the proposed classes are not identical with each other as against the Tribal Claims and they are not fixed *inter se*. Therefore, they are not appropriate to class adjudication. The holders of those rights must be joined.

IV. THE CLASS CERTIFICATION MOTION MUST BE DENIED BECAUSE PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS OF RULE 23(a).

A. Introduction.

Rule 23(a) of the Federal Rules of Civil Procedure, provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or

> defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements apply to both plaintiff and defendant class actions. *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 230 (9th Cir.), cert. denied, 421 U.S. 963 (1975). Plaintiffs have the burden of establishing with specific facts that all the class action requirements are met with respect to each proposed class. *See, General Telephone Co. v. Falcon*, 457 U.S. 147 (1982); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-1235 (9th Cir. 1996); *In re Hotel Telephone Charges*, 500 F.2d 86, 88 (9th Cir. 1974); *Sherman v. Griepentrog*, 775 F.Supp. 1383, 1388 (D.Nev. 1991). The failure of proof as to a single requirement means class certification must be denied. *General Telephone, supra.* The trial court must make a "rigorous analysis" to determine that the requirements of Rule 23 have been satisfied. *Id.* It does not take a "rigorous analysis" here, however, to determine that the Tribe and the United States have not met their burden with respect to either proposed class.

B. Joinder Of 950 Persons And Entities In The Proposed Successor In Interest Class And 725 Or Fewer Persons In The Proposed Domestic Well Class Is Not Impractical Where They Have Been Or Can Be Identified, Where They Are Located In A Limited Geographical Area And Where Those Proposed Classes Overlap With One Another And With Other Categories Of Defendants Who Must Be Identified And Joined.

The question of what constitutes "impracticability" depends on the particular facts of each case and no arbitrary rules regarding size, or "numerosity," of the proposed class have been established. 7A Wright, Miller, Kane, Federal Practice and Procedure § 1762 at 151-153 (1986); *see also Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986). Each class certification decision regarding the "numerosity" requirement is unique. *Griepentrog*, 775 F. Supp. at 1388. The basic question is practicability of joinder, not the number of members of the proposed classes. "Practicability of joinder" depends not just on the size of the class but also on the ability to identify its members and serve them and their geographic dispersion. 7A Wright, Miller, Kane § 1762; 5 Moore's Federal Practice, § 23.22. Joinder is considered practicable when all members of the class can be identified and are from the same geographic area. *Andrews*, 780 F.2d at 131-32.

Plaintiffs have not established and cannot establish that joinder of members of each proposed class here is impracticable. As this Court stated in its recent order denying the joint motion for an order requiring identification of all decreed water rights holders and their successors:

> [T]he United States and the Tribe . . . have access to the necessary information, even though it may be difficult to obtain. It is not as though finding the water rights holders is an impossible task. It does involve work, but the resources are available to the parties.

Doc. 522 at pg. 9, Case No. C-125.

The United States and the Tribe have obtained information from the District and the Board of Water Commissioners concerning the identity of the successors in interest under the Decree. They have access to county recorder and county assessor records. Domestic users of underground water can be identified from well log, county recorder and county assessor information. Except for residents of Yerington and Hawthorne, persons living in the groundwater basins in question must obtain their domestic water from wells.

To support a finding of "impracticability," plaintiffs argue that the members of the proposed classes are geographically "dispersed". *Supporting Memorandum*, p.5, ln. 24. "Dispersion" throughout Smith Valley, Mason Valley, Schurz and Walker Lake, or even throughout the entire Walker Lake basin, is not the kind of "geographical dispersion" that justifies class certification. *See, e.g., Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal. 1984) *aff'd*, 747 F.2d 528 (9th Cir. 1984) (joinder impracticable in nationwide action by Medicaid beneficiaries). For the most part, the successors in interest are farmers and ranchers living within four valleys in a single watershed. The domestic users of underground water are also within a compact geographic area within the same watershed.

As an additional reason for finding that joinder is impracticable, the United States and the Tribe assert that "membership" in the proposed classes fluctuate. *Supporting Memorandum* p. 7. They rely on two plaintiff class action cases, *Arthur v. Starrett City Assocs.*, 98 F.R.D. 500 (E.D.N.Y. 1983) and *Folsom v. Blum*, 87 F.R.D. 443 (S.D.N.Y. 1980). In those cases, however, the fluctuation did not result from one "member" succeeding to the

interest of another "member." Thus, the solution which the Court has adopted here for dealing with changes in ownership was not available there. Because of that solution, the assertion that joinder is impracticable because of "fluctuation" in class members simply does not apply here.

Finally, it is clear that many of the persons who are among the 950 successors in interest identified by plaintiffs' paralegal are included in the persons with domestic wells. The converse is also true. Moreover, many of the successors in interest and domestic users of groundwater are also holders of permits or certificates to pump groundwater for irrigation in Nevada and holders of vested rights in Nevada (Category 3(f)). Some may also be users of groundwater for irrigation in California (Category 3(e)). Some may also be holders of surface appropriations subsequent to the Decree (Category 3(b)). Those are all categories for which class certification is not sought and persons within them must be identified, joined and served. It simply cannot reasonably be argued that joinder is impracticable here.

C. The Claims And Defenses Of The Class Representatives Are Not Typical Of Those Of The Class And The Class Representatives Cannot Fairly And Adequately Protect The Interests Of The Class.

Rule 23(a)(3) and (a)(4) require that the "claims or defenses of the representative parties be typical of the claims or defenses of the class" and that the "representative parties will fairly and adequately protect the interests of the class." At times courts combine their discussion of these requirements. Both govern the relationship between the class representative and other class members. Moore's Federal Practice § 23.24[3] (3rd ed.). They are considered together here because the facts relevant to both are the same.

The typicality requirement is intended to insure that the interests of the class representative are aligned with those of the absent class members. *Hanon v. Data Products Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The adequacy of representation requirement is designed to protect the due process rights of absent class members. *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). A class representative should not have interests which conflict with the interests of members of the class *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997).

Plaintiffs have proposed that the District be named as the class representative for the successors in interest class. The District would be an inadequate representative as a matter of law because of the fundamental differences between the District and the proposed class. First, unlike the successors in interest, the District is not a user of water. It is not an irrigator. Second, the District is not a membership organization. It is a Nevada irrigation district established and operating pursuant to NRS Chapter 539. It is like any other special district under state law. It has boundaries and real property within its boundaries is subject to assessments and, in certain cases, taxes. *See, e.g.*, NRS §§ 539.020; 539.023; 539.025; 539.043; 539.055; 539.667 *et seq.*

Third, the boundaries of the District lie within the State of Nevada. Successors in interest under the Decree who own land with appurtenant water rights in Bridgeport and Antelope Valleys in California cannot be adequately represented by the District and the District does not levy assessments on that land pursuant to the provisions found in the Nevada Irrigation Act, NRS Chapter 539. Clearly, the District cannot use monies received in connection with the levy of assessments on Nevada lands to defend the interests of California successors in interest.

Fourth, the District holds water rights for purposes of delivery to some, but not all of the lands within the District. The assortment of water rights held by the District for that purpose is different than the assortment of water rights held by the successors in interest and each successor in interest also has a unique assortment of water rights. The District holds rights to store water in California for use in Nevada. It holds direct diversion rights for use in Nevada and underground rights for use in Nevada. Except to the extent that it has acquired lands as a result of delinquent assessments, the District is not a "successor in interest" to water right holders under the Decree.

Nevada is proposed as the class representative for the domestic ground water users. There are also some fundamental differences between Nevada and the proposed class it is to represent. First, Nevada, through NDOW, holds a unique assortment of water rights which is different than the assortment of water rights held by the domestic groundwater users.

NDOW would be a member of the successors in interest class. It also holds rights for the use of effluent and underground rights. In addition it holds a right issued for the benefit of Walker Lake. As noted above members of the proposed classes overlap with categories of persons to be joined and served under other provisions of the CMO and therefore have unique assortments of water rights.

Because the threshold issues are not yet identified, it is difficult to anticipate whether the positions of the proposed class representatives on them will be typical of those of the classes they are to represent. What is certain, however, is that the position of a member of either proposed class will be based upon their unique and total water rights package and not on whether they are a domestic user of groundwater or the holder of a Decree Right. Because of those facts, there is potential for conflict within the proposed classes themselves and with their proposed class representatives, even on some of the potential threshold issues.

Admittedly, there is likely to be unanimity on any defense which is a complete bar to all of the Tribal Claims. However, unanimity may end there. Most of the other potential threshold issues relate to the "sole source" theory and the extent to which the Court should become involved in regulating the use of underground water within the watershed. It is possible that the position of persons in each class on those issues will turn on whether they do or do not hold rights to supplemental underground water for irrigation. Those who do not may embrace the "sole source" concept as a means to access to a larger source of supply. Those who do may oppose it. Neither the District nor Nevada can adequately represent the members of the proposed classes on those issues. *See Mayfield*, 109 F.3d at 1427.

The potential for conflict between the District and members of the successors in interest class increases if the Court reaches the merits of the Tribal Claims. Again that potential is shaped by the total water rights package of each class member.

First, successors in interest who own land with water rights solely in California may have a position different from those who own land with water rights solely in Nevada. Water from interstate streams needed to satisfy uses on federal reservations is sometimes charged to the allocation of the water of the state in which the reservation is located. In other

words, California successors in interest may assert that they should not be impacted by the Tribal Claims at all. Certainly, a Nevada irrigation district which supplies water solely for irrigation in Nevada cannot represent that interest.

Second, there is potential for conflict between the District and some members of the successors in interest class based upon the junior water rights, both surface and underground, held by the District to supplement the supplies of water right holders within the District who have Decree Rights with priority dates later than 1873 and New Land Water Rights. There is similar potential for conflict with the same water right holders, based upon the District's Nevada permit for the yet to be built Hoye Canyon Dam and Reservoir.

Third, differences in priority dates of the surface water rights of the successors in interest may dictate a difference in position on the Tribal Claims. Successors in interest with senior water rights may be less affected or possibly not affected at all.

Fourth, differences in the overall water rights assortments of members of the successors in interest class may also result in differences in position on the merits. Those who have supplemental storage or groundwater supplies may be affected differently from those who do not.

Fifth, with respect to issues related to the Tribal Claims for underground water, successors in interest with underground water supplies for irrigation may be affected differently based upon priority, geography and hydrology. Thus, their positions on the merits of those Tribal Claims may also be different.

Finally, if the Court decides the threshold issues in a way which embraces the Tribes Claims to underground water, the Court cannot grant effective injunctive relief without adjudicating the relative priority and relationship of some or all the underground water rights within the Basin. Similarly, if it decides the threshold issues in a way which embraces the "sole source of supply theory," it will be required to adjudicate the relative relationships of all users to that sole source of supply. Those relationships may have more to do with hydrology than with priority. At that point, every member of the proposed successor in interest class has a

conflict with every other member. The same is true of the members of the proposed domestic groundwater user class.

Nevada, in its opposition, has stated the reasons why Rule 23(a)(3) and Rule 23(a)(4) are not satisfied with respect to the proposed domestic groundwater users class. Those reasons will not be repeated here.

V. THE CLASS CERTIFICATION MOTION MUST BE DENIED BECAUSE PLAINTIFFS CANNOT SATISFY ANY OF THE SECTIONS OF RULE 23(B).

In addition to meeting the four requirements of FRCP Rule 23(a), a proposed class must satisfy the requirements of at least one of the three subdivisions of FRCP Rule 23(b) in order to be certified. The United States and the Walker River Paiute Tribe argue that this action meets the requirements of all three subdivisions of Rule 23(b). *Supporting Memorandum*, p. 14, lns. 12-13. A closer analysis shows that it, in fact, satisfies none.

A. This Action Does Not Meet The Requirements Of Rule 23(B)(1) Because Plaintiffs Cannot Establish The Risk Of Incompatible Standards Of Conduct.

In order to satisfy the requirements of Rule 23(b)(1), the United States and the Walker River Paiute Tribe must prove that:

> The prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. Rule 23(b)(1)(A).[2]

This means that, for a class to be certified under 23(b)(1)(A), there must, first of all, be a realistic possibility that there will be separate litigation if the proposed class is not certified. *See, e.g., Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2nd Cir. 1968), *rev'd on other*

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[2] As explained by Moore, "Rule 23(b)(1) is divided into two parts: clause A addresses the risk posed to the party opposing a class; clause B addresses the risk posed to the individual members of a class." 3D Moore's Federal Practice §23.40[1] pp. 23-152 --23.152.1. As parties opposing the proposed class, the United States and the Tribe attempt to justify a class action only under clause A. They do not and cannot act here on behalf of the defendant members of the proposed classes. In any event, for a defendant class to be certified under 23(b)(1)(B), there must be a risk of separate adjudications that would impair or impede the interests of individual defendants. No such risk obtains here.

grounds, 417 U.S. 156 (1974); *Roper v. Conserve*, 578 F.2d 1106, 1111 n.3 (5th Cir. 1978); *Eliason v. Green Bay & W. R.R.*, 93 F.R.D. 408, 412 (E.D.Wis. 1982), *aff'd*, 705 F.2d 461 (7th Cir.), *cert. denied*, 464 U.S. 874 (1983); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1544-1545 (11th Cir. 1987); 7A Wright, Miller, and Kane §1773, p. 427 (1986); 5 Moore's Federal Practice 3d §23.41[1]. Furthermore, not only must there be a genuine possibility of other litigation, such other litigation must be likely to produce incompatible standards. *See, e.g., McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied sub nom, Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911, (1976); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Midland Bancor, Inc.*, 158 F.R.D. 681 (D.C.Kan. 1994).

Plaintiffs fail both requirements. They make no claim that, in the absence of class certification, there is any likelihood of separate litigations here. Nor could such a claim be sustained. This Court has required the plaintiffs to join as counterdefendants "each of the members of each such category." *CMO*, p. 5, lns. 1-7. The plaintiffs' argument, accordingly, is not that there is a risk of incompatible standards set by multiple litigations but rather that this Court may itself in this single lawsuit make inconsistent and incompatible determinations as to factual and legal issues.[3] This argument is mere hypothetical nonsense. There is no realistic risk in this case of either separate litigation or incompatible standards.

The plaintiffs rely exclusively on *United States v. Truckee-Carson Irrigation District*, 71 F.R.D. 10 (D.Nev. 1975), to support their argument for class certification under 23(b)(1)(A). The *Truckee-Carson* decision, however, is both wrong and distinguishable. The Court in *Truckee-Carson* did not require that there be a realistic possibility of separate litigation creating incompatible standards. It based its certification of the class under 23(b)(1)(A) on the totally hypothetical possibility of inconsistent adjudications within the same case. 71 F.R.D. at 17. That is contrary to the established jurisprudence governing class certification under

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[3] Apparently plaintiffs are also arguing that the Ninth Circuit would not correct any incompatible determinations on appeal.

23(b)(1)(A). *See* cases cited supra.[4] The *Truckee-Carson* Court was primarily concerned with achieving a "unitary adjudication" of the rights at issue. 71 F.R.D. at 17. Such a "unitary adjudication" will be achieved in the instant case under the terms of the CMO providing for joinder of each of the defendants in each of the identified categories.

For subsection (b)(1)(A) to apply, plaintiffs must show that, if the defendant classes are not certified, they are subject to the risk of inconsistent adjudications that would establish incompatible standards of conduct. Plaintiffs have not made and cannot make that showing. Accordingly, certification of the defendant class under Rule 23(b)(1) is inappropriate. *See, In re Seagate Technologies Securities Litigation*, 115 F.R.D. 264, 273-274 (N.D.Cal. 1987) (court found it "difficult to conclude that plaintiffs would be subjected to incompatible standards of conduct' absent certification of defendant class"); *In re Activision Securities Litigation*, 621 F.Supp. 415, 437 (N.D.Cal. 1985).

B. Rule 23(B)(2) Is Unavailable Because It Does Not Authorize The Certification Of Defendant Classes.

Under Rule 23(b)(2), an action may be maintained as a class action if the prerequisites of subsection 23(a) are met and in addition:

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

As written, Rule 23(b)(2) requires that the injunctive or declaratory relief must be requested against the party opposing the class. It does not apply to defendant class actions because the declaratory or injunctive relief would have to be requested against the plaintiff. *See, e.g.*, *Henson v. East Lincoln Township*, 814 F.2d 410, 413-417 (7th Cir. 1987), *cert. granted*, 484 U.S. 923, *cert. dismissed*, 506 U.S. 1042 (1993).

Henson involved an action brought by a legal aid bureau to require local welfare

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[4] Even if the *Truckee-Carson* Court applied the correct analysis, its decision is distinguishable. Neither the successors in interest under the Decree nor the domestic well users in the specified sub-basins have identical rights comparable to the certificate holders of *Truckee-Carson. See supra* pp. 10-12.

departments in various counties of Illinois to establish written standards for welfare eligibility and notice-and-hearing procedures for the grant or denial of welfare applications as mandated by the U.S. Supreme Court. There were approximately 770 such local departments and the action sought certification under Rule 23(b)(2) of a defendant class of those departments and their supervisors. 814 F.2d at 412. The trial court denied certification on the grounds that Rule 23(b)(2) does not permit defendant classes. The Seventh Circuit Court of Appeals affirmed.

In a comprehensive analysis, the Seventh Circuit found that the language of 23(b)(2) and its drafting history along with considerations of due process[5] and case management all mandated the conclusion that Rule 23(b)(2) neither provides for nor permits the defendant class action. 814 F.2d at 413; 417;[6] *see also*, *Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981) (23(b)(2) applies only where class of plaintiffs seek injunctive relief against defendant); *Thompson v. Board of Education*, 709 F.2d 1200, 1203-1204 (6th Cir. 1983); 7A Wright, Miller & Kane §1775, p. 462 ("[T]he language is clear and the better view is to restrict its applicability to plaintiff classes seeking injunctive relief."). The Advisory Committee's Notes as well describe the (b)(2) class action

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[5] Noting that subsection 23(b)(2) contains no requirement for notifying the members of the class, the Seventh Circuit Court wrote that "It would be odd if the rule permitted a defendant class without requiring notice." 814 F.2d at 415; *cf.*, *In re the Gap Stores Securities Litigation*, 79 F.R.D. 283, 291-292 (N.D.Cal. 1978) ("[I]n the context of defendant class actions due process requires notice to each class member.")

[6] *Henson* also addresses the extant case law under 23(b)(2), distinguishing both *Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.), vacated on other grounds sub nom, Lombard v. Marcera, 442 U.S. 915 (1979)* and *Blake v. Arnett, 63 F.2d 906 (9th Cir. 1981). 814 F.2d at 413-414.* In *Marcera*, the Second Circuit permitted a defendant class of local public officials without any significant analysis of the issue. This ruling has not been extended beyond the class of public officials bound to act in accordance with a statute, regulation or policy under attack by the plaintiff or plaintiffs. In *Blake*, the issue of a possible bar to defendant class actions under 23(b)(2) was not raised. Furthermore, on the facts in *Blake*, the parties were actually reversed. *Blake* involved a declaratory relief counterclaim brought against a "class" of Indians who were allegedly being denied the right to cross, hunt and fish upon the counterclaimant's property which was located within the Reservation. The true plaintiffs were the Indians and the true defendant was the landowner who was allegedly denying them access. Accordingly, when the *Blake* case is analyzed, it falls within the general rule limiting 23(b)(2) to plaintiff classes.

exclusively as an action by a plaintiff class against a defendant who has done something injurious to the class as a whole. 12A Wright, Miller, Kane & Marcus, pp. 300-301.

By its express language, subsection (b)(2) of Rule 23 simply does not permit class certification where the plaintiff seeks declaratory or injunctive relief against a defendant class. The Supreme Court has written with respect to Rule 23 that:

> [C]ourts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. [Citation omitted.] The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge. . . any substantive right.' [Citation omitted.]. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also*, *Henson*, *supra*, 814 F.2d at 414 (The court should not "create new forms of judicial proceeding in the teeth of the existing rules.")

Plaintiffs simply never address whether defendant classes are permitted by subsection (b)(2) or the due process issues inherent in such a determination. They support their argument for 23(b)(2) certification by citing three plaintiff class actions (*Washington v. CSC Credit Services Inc.*, 199 F.3d 263 (5th Cir. 2000), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); and *Jefferson v. Ingersoll*, 195 F.3d 894 (7th Cir. 1999), in which the issue involved the pursuit of monetary rather than injunctive or declaratory relief), and *Southern Ute Indian Tribe v. Amoco Production Company*, 874 F.Supp. 1142 (D.Colo. 1995), *rev'd on other grounds*, 119 F.3d 816 (10th Cir. 1997), *aff'd in part on rehearing en banc*, 151 F.3d 1251 (10th Cir. 1998), *rev'd on other grounds*, 526 U.S. 865 (1999).

Southern Ute was an action brought by the Southern Ute Tribe against various oil companies and individuals to determine the ownership of coalbed methane gas located on land that had been ceded to the United States and then restored to the Tribe. There were 100 named oil company defendants and another approximately 20,000 individuals with interests in coalbed methane gas leases. Plaintiffs argue that "no court ever disturbed the class certification and it remained intact through final Supreme Court treatment of the case." *Supporting Memorandum*, p. 17, lns. 2, 25-26. Plaintiffs, however, omit to advise the Court that the

motion for defendant class certification in *Southern Ute* was, in fact, a joint motion brought by both the plaintiff tribe and a number of defendants including the lead defendant, Amoco, or that only 3 of the 100 named defendants ever objected to the certification of a defendant class. *Southern Ute Indian Tribe v. Amoco Production Company*, 2 F.3d 1023, 1025-1026 (10th Cir. 1993). There is no discussion in any of the reported decisions in the *Southern Ute* dispute, from the trial court to the Supreme Court, of the appropriateness of defendant class certification or of any basis for that certification other than what was for all practical purposes, the agreement of the parties. Certification of a defendant class essentially by stipulation provides no authority whatsoever for the certification of any class of defendants in the present case. Certification of a defendant class under Rule 23(b)(2) remains unavailable as a matter of law and the plaintiffs' motion on that ground must be denied.

C. Rule 23(B)(3) Is Unavailable Because Common Issues Do Not Predominate And Because A Class Action Is Not Superior To Other Alternatives.

Plaintiffs also argue that the proposed defendant classes may be certified under 23(b)(3). In addition to the prerequisites of 23(a), certification under 23(b)(3) requires the court to find:

(1) that "the questions of law or fact common to the members of the class predominate over any question affecting only individual members," and

(2) that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."

As with all class action requirements, plaintiffs must establish "predominance" and "superiority" with specific facts. *See, General Telephone Co. v. Falcon*, 457 U.S. 147, 159 (1982) ("predominance" finding requires "significant proof"); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-1235 (9th Cir. 1996; *In re Hotel Telephone Charges*, 500 F.2d 86, 88 (9th Cir. 1974). Plaintiffs have plainly failed their (b)(3) burden here. They have not established either the requisite "predominance of common issues" or the "superiority of the class action." Their Class Certification Motion must be denied in its entirety.

1. Common Issues Of Law And Fact Do Not Predominate Over Individual Questions.

Plaintiffs allege in the caption that "the common question of law and fact predominate" and they note in the argument that Rule 23(b)(3) requires analysis of both "predominance" and "superiority." *Supporting Memorandum*, p. 18, ln. 14, lns. 19-23. Plaintiffs, however, make no effort whatsoever to support their "predominance" claim or to compare in any way the individual issues in this action with the allegedly common issues. There is simply no basis in this record upon which this Court could make a finding that the common issues predominate.

Irrespective of the failure of plaintiffs to offer any proof, however, the common issues in this case cannot be found to predominate over the individual issues of law and fact arising from individually owned water rights. Although certain threshold issues may, in fact, be common, "predominance" is not determined by the most immediate issues but rather by a pragmatic evaluation of the whole case. *See, e.g., Rodriguez v. Carlson*, 166 F.R.D. 465, 477 (E.D.Wash. 1996). Nor can "predominance" be "manufactured" by separating out the common issues for class action purposes. *See, e.g., Castano v. American Tobacco Company*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996).

Considering this case as a whole, the court cannot find that the common issues predominate over individual issues relating to individual water rights. Taking the plaintiffs' amended counterclaims to their ultimate possible conclusion, this Court would have to adjudicate the individual water rights of all groundwater users within the Walker River Basin. Those individual water rights arise under different facts and circumstances and require individual proof. At this point, if not before, defendants' "common defenses" become conflicting claims. It is well established that such cases are not appropriate for class certification. *See, e.g., Miller v. Jennings*, 243 F.2d 157 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957); *People of the State of California v. United States*, 235 F.2d 647 (9th Cir. 1956).

Plaintiffs acknowledge that "[a]t the appropriate time, the Court may consider vacating its certification order so that the effect of the United States' and the Tribe's claims on individual decreed rights can be ascertained." *Supporting Memorandum*, p. 11, lns.

24-26. But that concession only begs the question. Because of these individual issues and conflicting claims of individual defendants, those same defendants must be allowed to participate fully in their own defense on the threshold issues as well as the issues of fundamental declaratory relief sought by plaintiffs. Both sets of issues are critical to the protection of the defendants' individual claims and rights.

The "predominance" analysis must also be made in the larger context of the public policies which justify the class action device. For example, there is case law which articulates standards for "predominance" as whether resolution of common issues will "significantly advance" the litigation or whether "common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *See, e.g., In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 722 (E.D.N.Y. 1983), *cert. denied*, 484 U.S. 1004 (1988). These standards obviously arise out of the policy concern of avoiding multiple adjudications which may not only be repetitive and inefficient but produce inconsistent results. That policy and the standards generated to implement it have no application here. No matter how "significant" the common issues may be here, there is but a single adjudication. In fact, the significance of the common issues in this case actually militates against the certification of a class action.

The "predominance" inquiry and analysis here must take into account that the proposed classes consist of defendants who have not sought certification. Although the defendant class action must meet the same essential criteria under Rule 23 as the plaintiff class action, the analysis is necessarily different. A member of a plaintiff class stands to gain from the litigation. He or she risks only the right to bring a separate lawsuit. A member of a defendant class, however, stands to lose whatever rights are at issue without having had the opportunity to personally defend or protect those rights. *See, e.g., Thillens, Inc. v. Community Currency Exchange Association*, 97 F.R.D. 668, 674 (N.D. Ill. 1983). If there are significant "common" issues in this already unitary adjudication, the individual defendants should not be precluded from participating fully in the resolution of those issues.

2. The Class Action Is Not Superior To Alternative Methods Of Adjudication In This Case.

The superiority requirement of 23(b)(3) requires the determination that the class action is better than other methods of adjudication for the particular case. *See, e.g., Beebe v. Pacific Realty Trust*, 99 F.R.D. 60, 73 (D. Or. 1983). Thus, even if "predominance" of common issues could be found, certification of the proposed defendant classes here is still inappropriate because, when compared to the joinder of individual water rights holders in this action as outlined in the CMO, the partial class action proposed by plaintiffs is clearly not superior.

Plaintiffs effectively convert the 9 categories of defendants set out in the CMO into 10 and propose that 2 of those 10 categories (mostly farmers and ranchers) be forced into "class" representation for purposes of litigating the threshold issues and the fundamental declaratory relief sought in the amended counterclaims. The members of the remaining 8 categories, including the industrial and municipal users, get to defend their interests individually and determine for themselves how best to protect their rights.

Rule 23(b)(3) directs the Court to look specifically at "the interest of members of the [proposed] class in individually controlling the prosecution or defense of [their claims]."[7] The Advisory Committee for the 1966 amendments further suggests that, in every case, courts must "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." 12A Wright, Miller, Kane & Marcus,

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[7] In its non-exclusive list of considerations, Rule 23(b)(3) also requires the Court to look at "the extent and nature of any litigation . . . already commenced," the "desirability or undesirability of . . . the particular forum," and "difficulties likely to be encountered in the management of a class action." As plaintiffs concede, the first two considerations are inapplicable on the facts of this case. *Supporting Memorandum*, pp. 19-20. There is no other litigation and no other forum. With respect to "difficulties" in the management of a class action, plaintiffs contend that "[r]ather than create difficulties," a class action here "would help streamline" the Court's management of the case. Id., p. 20, lns. 22-24. No explanation of how the case would be "streamlined" is offered. Presumably plaintiffs have reference to a reduction in the number of directly participating defendants and their lawyers. Certainly there would be no streamlining of the issues. Even the reduction in the number of defendants and their lawyers is more hypothetical than real, given the overlap in the categories of defendants and the

Appendices, Advisory Committee Notes, Rule 23, p. 302. Plaintiffs here offer no basis whatsoever on which this Court could fairly conclude that the members of their proposed classes -- the successors in interest under the Decree and domestic water users in the specified sub-basins -- are not as "interested" as the water rights holders in any of the other defendant categories in "individually controlling" the prosecution or defense of their rights.

With respect to this issue of the interest of individual class members in controlling the litigation of their own rights, plaintiffs only complain that "[t]he present parties to the proceedings have repeatedly raised the issue of the financial ability of water rights claimants as justification for requiring the United States and the Tribe to proceed to identify the potential defendants in this case without any assistance from the parties themselves." *Supporting Memorandum*, p. 19, lns. 4-7. Without acknowledging it is not ordinarily the job of a defendant to help a plaintiff sue him or recognizing that applying one's financial resources to helping someone sue you is different from applying those resources to defending your own rights and interests, plaintiffs suggest that class certification here would help defendants by relieving their financial burden. *Id.*, lns. 8-10. Plaintiffs argue that "[t]his is especially true" with respect to the proposed class of defendant domestic groundwater users, because "their individual interests are small" and they "may lack financial resources to participate fully or at all in this litigation." Id., p. 19, lns. 10-14; p. 7, lns. 1-7.

The notion that plaintiffs are doing defendants any favors here must be rejected out of hand. In the first place, most of the domestic groundwater users in category 3(c) are also either successors in interest with rights under the Decree or holders of permits or certificates to pump groundwater for agricultural use or both so their "individual interests" in this litigation are not "small." Furthermore, even for the individual whose only interest is a domestic well, the suggestion that such an interest is "small" and too much of a financial burden to protect could only be made by someone who has never depended on a well for drinking, cooking, cleaning and the total array of domestic needs. In this context, what is

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likelihood that members of the proposed classes will be individual defendants under some other category as well as the mandatory "opt-out" provisions of Rule 23(b)(3).

"small" to the federal government looms rather "large" to the well owner.

Because of its emphasis on the interest of the individual litigant in controlling his own litigation, subsection (b)(3), unlike the other subsections of Rule 23(b), requires that each member of the class be given the right to "opt out" of the class if the member so chooses. FRCP 23(c)(2). With a proposed defendant class, the issue of "superiority," in fact, often turns on the likelihood that many members of the class will voluntarily exclude themselves from the action. *See, e.g., In re Arthur Treacher's Franchise Litigation*, 93 F.R.D. 590, 595 (E.D.Pa. 1982) (certification denied as pointless since defendants would likely opt out); *see also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974). In the present case, the Court can expect that most, if not all, the members of the proposed defendant classes will "opt out." They will want the same opportunity as the members of other categories of defendants identified by the CMO to participate fully in protecting their own interests. Furthermore, the extensive overlap among those categories means that many of the members of the proposed defendant classes will already be participating as individually named defendants.

Subsection (b)(3) was added to Rule 23 by amendment in 1966. Although it does not preclude a defendant class action *per se*, subsection (b)(3) was written primarily to permit the aggregation of claims that otherwise might be too small to pursue. As noted by the Supreme Court, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products, Inc. supra*, 521 U.S. at 617. In such cases, the 23(b)(3) class action may be superior to alternative methods of litigation. It is plainly not superior to the joinder of all water rights holders in an adjudication affecting those rights.

D. The Proposed Form Of Notice Is Unacceptable.

Plaintiffs have included a proposed form of notice to be used in the event the Court grants the motion for class certification under 23(b)(3). *Supporting Memorandum*, Attachment 2. As proposed, the notice is confusing and inadequate as a matter of law. Because any discussion of the form of notice is premature at this time, the District requests the opportunity to address that issue fully if and when it becomes appropriate.

VI. CONCLUSION.

The class action is intended to promote judicial efficiency and consistency by bringing many small actions together into a single action. Neither purpose is served by imposing the defendant classes requested by plaintiffs here. This is already a single action. There is no risk of inconsistent adjudications and limiting the ability of some individual defendants to protect their own water rights will produce unfairness rather than efficiency. Plaintiffs' burden of proof with respect to the requirement of Rule 23 cannot be satisfied in this case. The Class Certification Motion must be denied.

Dated this 18th day of June, 2001.

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing *WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN OPPOSITION TO JOINT MOTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE FOR CERTIFICATION OF DEFENDANT CLASSES* in an envelope addressed to and where indicated by an asterisk by Federal Express also:

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Dated this 18th day of June, 2001.

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